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MICHAEL BODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD
IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-12a) and the Civil Aeronautics Board (Pet. App. 1c-10c) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1978. The petition for a writ of certiorari was filed on April 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Civil Aeronautics Board acted within its discretion in referring to an arbitrator the question whether employees had

made a timely request for arbitration under the terms of a Board order providing for arbitration of labor relations disputes resulting from an air carrier merger.

STATEMENT

In April 1972, the Civil Aeronautics Board approved the merger of Northeast Airlines, Inc., into petitioner Delta Air Lines, Inc., subject to a number of conditions (Pet. App. 1h-2h). Among the conditions was a requirement that the employee seniority lists for the two airlines be integrated in a fair and equitable manner, and that any dispute over the integration of the lists be settled by arbitration (Pet. App. 1i-2i, 11i-12i). The arbitration provision contemplated expedited settlement of such disputes: any dispute that could not be settled by the parties within 20 days could be referred to an arbitrator, whose decision would be rendered within 90 days after the controversy arose (Pet. App. 2a-3a, 11i).

When negotiations over the appropriate manner of integrating the stewardess seniority lists broke down, the group negotiating on behalf of the Northeast stewardesses asked their union, the Transport Workers Union of America, to pursue their arbitration remedy. The union informed Delta of the stewardesses' wishes and requested that a panel of arbitrators be convened. Delta refused to participate in the arbitration, however, on the ground that the union had not demonstrated that it still represented the former Northeast stewardesses (Pet. App. 3a).

The union subsequently filed a petition with the Board requesting that the Board order Delta to participate in the arbitration proceedings. The Board noted that it lacked expertise in labor matters and did not deem it appropriate to intervene to order arbitration where arbitration could be directed by a court. The Board therefore denied the petition on the alternative grounds that (1) no showing had been made warranting the Board's intervention; and

(2) the union's status as the stewardesses' former collective bargaining representative did not, itself, establish that the union represented the stewardesses for purposes of invoking the arbitration requirement (Pet. App. 4a, 1e-10e).

Following the decision, a number of dissatisfied stewardesses formed the Committee of Former Northeast Stewardesses to pursue the arbitration demand. When Delta continued to refuse to participate in arbitration proceedings, the Committee petitioned the Board to compel arbitration (Pet. App. 4a-5a). The Board again dismissed the petition (Pet. App. 1d-7d), but the court of appeals reversed and ordered the Board to rule on the merits of the petition. *Committee of Former Northeast Stewardesses v. Civil Aeronautics Board*, C.A. D.C., No. 75-1066, decided May 27, 1975 (unpublished order) (Pet. App. 1b-2b). The Board then granted the petition, ordering the parties to submit to arbitration (Pet. App. 5a, 1c-10c).

Responding to Delta's objection that the Committee's request for arbitration was untimely, the Board stated that ordinarily it would resolve such a question itself rather than delegate the issue to the arbitrator (Pet. App. 8c). In this case, however, noting the "highly unusual circumstances and conflicting assertions attending the history of this particular seniority list integration dispute" (Pet. App. 6c), the Board concluded that the record was not sufficiently clear to enable it definitively to resolve the timeliness question. According to the Board, the unsettled questions bearing on the issue of timeliness included the representational status of various groups seeking arbitration on behalf of the stewardesses; Delta's awareness of employee dissatisfaction with the integration of the seniority lists; and the possibility that Delta had contributed to the delay in the stewardesses' attempts to force

arbitration of the seniority list integration dispute (Pet. App. 7c). In light of the inadequacy of the record with respect to these issues, the Board referred the timeliness question to the arbitrator (Pet. App. 5a).

On Delta's appeal from the ruling, the court of appeals affirmed (Pet. App. 1a-12a). The court held that the Board had acted within its authority in delegating the question of timeliness to the arbitrator instead of deciding that question on the record before it. The court noted that "all the issues which the Board believed might ultimately be pertinent to the proper resolution of Delta's timeliness contention did have a factual basis in the record already before the Board and were unresolved at the time of its order" (Pet. App. 11a).¹

ARGUMENT

As the Board stated, the decision in this case was the product of "highly unusual circumstances." Those circumstances render the case virtually unique, and for that reason the decision below is of no general significance and does not warrant review by this Court. In any event, the court of appeals was correct in affirming the Board's order directing arbitration of the timeliness question.

1. The Board acknowledged that it had the authority to resolve the issue of timeliness and stated that in the ordinary case it would do so (Pet. App. 6c). Petitioner does not argue that the Board lacked discretion to refer the issue of timeliness to an arbitrator (see Pet. 17-18),² but only that the Board erred in doing so in this case.

¹After an evidentiary hearing, the arbitrator ruled, on June 1, 1977, that the request for arbitration was timely.

²It is well settled that an arbitrator can appropriately rule on whether the procedural prerequisites to arbitration have been satisfied, including compliance with time restrictions. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 556-559.

Specifically, petitioner takes issue with the Board's conclusion that there were unresolved questions in the record material to the timeliness issue (Pet. 15). Since, in petitioner's view, the Board had sufficient facts before it to rule on that issue, "the Board improperly delegated the issue to an arbitrator under its own standard for delegation" (*ibid.*).

Petitioner is incorrect in asserting (Pet. 11-15) that the record was so clear that the Board erred in failing to rule on the timeliness question itself. As the Board suggested, petitioner's conduct in responding to requests for arbitration and its awareness that the Northeast stewardesses wanted to have the dispute arbitrated were both potentially relevant to the issue of timeliness. The Board's summary of the procedural history of the case (Pet. App. 6c, 2d-4d, 2e-5e) makes it clear that petitioner steadfastly resisted arbitration from the outset; the Board thus properly regarded as open the question whether petitioner's conduct could have served "to defeat, through delay, legitimate rights to arbitration" (Pet. App. 6c-7c). Moreover, if petitioner was aware throughout that the Northeast stewardesses wanted to have the dispute arbitrated, that fact could be relevant in determining whether the initial steps taken by the stewardesses or their representatives to obtain arbitration should be deemed sufficient even if they fell short of a formal invocation of the arbitration mechanism. Finally, the question of the representational capacity of various groups, including the union, during the period immediately following the merger, would be relevant to determining whether the union's actions in seeking arbitration at that time should be deemed a sufficient request on behalf of the stewardesses.

Petitioner's answer to the questions raised by the Board is that there were long periods in the course of the proceedings when no arbitration demand was made, and that the failure of the Committee of Former Northeast Stewardesses or some other representative group to

petition for arbitration at an early time during this period should bar the assertion of a right to arbitration regardless of the outcome of the inquiries suggested by the Board (Pet. 14). The point of the Board's observations, however, was that there might be reasons to excuse the long delays that preceded the final formal request for arbitration. Petitioner's assertion that there were long delays is not responsive to the Board's concern that the record did not sufficiently establish whether the delay was excusable.

2. Similarly unfounded is petitioner's suggestion (Pet. 16) that the Board's decision to relegate the issue of timeliness to the arbitrator was inconsistent with its prior orders in this case. To the contrary, as the court of appeals noted, "throughout the prolonged proceedings leading to this appeal, the Board had consistently stated that [petitioner's] particular timeliness argument should be resolved in negotiation and arbitration" (Pet. App. 10a n. 24). In the earlier proceedings, the Board dismissed the petitions to compel arbitration without ruling on their merits. The Board thus had no occasion to rule then on the issue of timeliness, or to suggest whether there were any unusual circumstances that would bear on the resolution of that issue.

Likewise, contrary to petitioner's contention (Pet. 19-20), the Board's statement that the representational capacity of the union and other groups was unresolved is not inconsistent with its previous orders. In its order dismissing the union's petition for arbitration, the Board had held, *inter alia*, that the union was not a representative of the stewardesses for purposes of invoking the arbitration provisions merely because it had previously been their collective bargaining representative (Pet. App. 5e, 7e-8e). By this ruling, the Board did not hold that the union was not or could not be the stewardesses'

representative for the purposes of the arbitration proceeding; it held that the union did not automatically represent the stewardesses solely because of its prior status. The factual question of representation remained unresolved.

3. Petitioner's argument that the court of appeals employed an incorrect standard of review (Pet. 17-22) restates its claim that the facts relating to the timeliness issue were sufficiently established in the record before the Board and that the Board should therefore have disposed of the issue in petitioner's favor. For the reasons given above, the court correctly rejected this claim and held that the administrative record "supports the factual existence of those issues which the Board believed might be important to the final disposition of the timeliness issue" (Pet. App. 11a). Given those factual issues, the decision of the court of appeals in this case is not in conflict with the decisions cited by petitioner (Pet. 19) in which courts have reversed agency factual conclusions that were at variance with the record. Instead, the court of appeals properly ruled that the Board's determination to delegate the issue of timeliness to the arbitrator was an exercise of agency discretion having a rational basis in the record and therefore should not be disturbed. *Camp v. Pitts*, 411 U.S. 138; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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